NO. 89-5503

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

FREDERICK LYNN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

DON SIEGELMAN
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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT GRANT CERTIORARI AS TO PETITIONER'S SIXTH AMENDMENT CLAIM WHERE NO SIXTH AMENDMENT ISSUE WAS RAISED IN OR DECIDED BY THE COURT BELOW?

II. SHOULD THE COURT GRANT CERTIORARI AS TO PETITIONER'S FOURTEENTH AMENDMENT ISSUE WHERE IT IS PLAINLY NOT WORTHY OF CERTIORARI REVIEW?

PARTIES

The caption contains the names of all parties in the court below.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals affirming petitioner's conviction and death sentence reported as Lynn v. State, 543 So.2d 704 (Ala.Cr.App. 1987). The decision of the Supreme Court of Alabama affirming the decision of the Court of Criminal Appeals is reported as Ex parte Lynn, 543 So.2d 709 (Ala. 1988).

JURISDICTION

The Court has no jurisdiction as to the Sixth Amendment issue raised in the petition because it was not raised in or decided by the Court below. The Court has jurisdiction as to the Fourteenth Amendment issue under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI
(in pertinent part)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,....

United States Constitution, Amendment XIV
(in pertinent part)

> ...[N]or shall any state...deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted in April 1983 by the Grand Jury of Barbour County, Alabama, for the capital offense of intentional killing during a nighttime burglary of an occupied dwelling under Code of Alabama 1975, § 13A-5-31(a)(4) (repealed). Petitioner was convicted and sentenced to death, but this conviction was reversed by the Supreme Court of Alabama. Ex parte Lynn, 477 So.2d 1385 (Ala. 1985).

Petitioner was tried a second time, and again convicted and sentenced to death. On appeal the case was remanded by the Court of Criminal Appeals of Alabama, under the authority of Batson v. Kentucky, 476 U.S. 79 (1986), for a determination of whether there was a prima facie case of discrimination under Batson and, if so, to give the prosecutor an opportunity to give race-neutral reasons for his strikes. Lynn v. State, 543 So.2d 704 (Ala.Cr.App. 1987). The trial court subsequently found no discrimination. On return to remand the case was affirmed by the Court of Criminal Appeals. Id. The decision of the Court of Criminal Appeals was affirmed by the Supreme Court of Alabama on December 30, 1988. Ex parte Lynn, 543 So.2d 709 (Ala. 1988). On July 14, 1989, the Supreme Court of Alabama overruled an application for rehearing.

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI AS TO PETITIONER'S CLAIM BASED ON THE SIXTH AMENDMENT BECAUSE NO SIXTH AMENDMENT ISSUE WAS RAISED IN OR DECIDED BY THE COURT BELOW

Petitioner claims that the prosecutor's striking of certain black jurors violated his Sixth Amendment right to an impartial jury. The argument in the Supreme Court of Alabama, however, was based on Batson v. Kentucky, 476 U.S. 79 (1986), which pertains to the Fourteenth Amendment alone (see Appendix A, a copy of petitioner's brief in that court). The decision of the Supreme Court of Alabama addressed only arguments under Batson. Ex parte Lynn, 543 So.2d 709 (Ala. 1988).

This Court has no jurisdiction as to issues neither raised in nor decided by the court below. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). For this reason the Court should deny the petition as to this Sixth Amendment issue.

II. THE COURT SHOULD DENY CERTIORARI AS TO PETITIONER'S CLAIM BASED ON THE FOURTEENTH AMENDMENT BECAUSE IT IS NOT WORTHY OF CERTIORARI

Petitioner asks the Court to grant certiorari and decide whether reasons given by the prosecutor for his strikes of certain black jurors were race-neutral. The actual claim, however, as presented by petitioner's own argument, is not that these reasons are facially insufficient, but that the record as a whole indicates discrimination. This issue presented is not worthy of certiorari review.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Court established a general procedure to be followed where a defendant believes he is the victim of racial discrimination in jury selection. The defendant must first make a prima facie showing of discrimination. 476 U.S. at 96-97. If this is done, the burden shifts to the prosecution to come forward with race-neutral reasons for its strikes of the veniremembers in

question. Id., at 97. The trial court then has the duty to determine, based on all relevant circumstances, whether there was purposeful discrimination. Id., at 98.

The trial in this case was held prior to Batson v. Kentucky, supra. On appeal the Court of Criminal Appeals, noting that Batson was applicable to the case under Griffith v. Kentucky, 479 U.S. 314 (1987), remanded the case to the trial court for a determination of whether a prima facie case of discrimination had been established and, if so, to give the prosecutor an opportunity to come forward with race-neutral reasons for his strikes. Lynn v. State, 543 So.2d 704, 706 (Ala.Cr.App. 1987). A hearing was held, at which the prosecutor gave explanation for his strikes, and the trial court found no purposeful racial discrimination. This decision was affirmed by the Court of Criminal Appeals, and later by the Supreme Court of Alabama. Ex parte Lynn, 543 So.2d 709 (Ala. 1988).

The prosecutor's reasons were as follows:

> At the hearing, the District Attorney testified, under oath, and the trial court allowed defense counsel to cross-examine the witness. The District Attorney's stated reasons for striking the eleven black persons from the jury venire are as follows: (1) The juror was the brother of a man the District Attorney had criminally prosecuted and convicted "on several occasions" and the brother of another man against whom the District Attorney's Office was "presently enforcing child support." (2) The juror's husband was related to the defendant's father. (3) The juror was twenty-five years old and "reputed to be connected with drugs." His father had a felony record and had been convicted of a drug related offense. The juror also lived in the same area of the county as did the lead defense counsel. (4) The juror lived in an area where the defendant was living at the time of the crime and where the defendant's aunt and grandmother had lived for "numerous years." (5) The juror was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a key witness against the defendant. Strong had a "bad reputation" and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. If the juror knew of Strong, he might not believe his testimony. Additionally, a small community was involved and the juror's name was Jackson. The District Attorney had prosecuted and convicted eight people named Jackson in the past eight years. The District Attorney

> suspected that the juror might be related to one of those convicts. (6) The juror was twenty-eight years old, unemployed, and lived closed to a city magistrate. The lead defense counsel was the city clerk and the mayor assisted defense counsel in striking the jury. (7) The juror lived one block from co-defendant Strong. The District Attorney "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." The juror also lived in "a very high crime district" and might "not be as shocked or opposed to crime because of those things." (8) The juror was a neighbor of the defendant's grandmother and aunt and lived in close proximity to the defendant when the crime was committed. (9) The juror was a friend of, and worked with, the wife of the father of the defendant. (10) The eighty-year-old juror appeared "feeble and hard of hearing" and "somewhat weak on death qualifications." (11) The juror was twenty-three years old, had a child fathered by co-defendant's Strong's brother, and was related by marriage to a state investigator who would testify as a witness. The investigator felt she would not be favorable to the State's case.

543 So.2d at 708-709. These reasons are related to this case in that they either arise from the particular facts here or are consistent with the State's general striking philosophy in any criminal case. Petitioner presents no serious argument that these reasons are not race-neutral on their face. Rather, petitioner argues in the main that these reasons are unacceptable here because, allegedly, they are inconsistent with voir dire questioning and other striking by the prosecutor.

The issue thus presented by petitioner is not whether the reasons here were facially satisfactory under Batson, but instead whether based on the record as a whole the trial court was correct in finding no discrimination. The Court stated in Batson that because the trial court's findings on the ultimate issue of discrimination largely turn on questions of credibility, those findings are entitled to "great deference" on appeal. Id., at 98 n. 21.

The issue here is not worthy of certiorari review, for two reasons. First, any decision here would have little value as precedent. The issue is whether, based on all the circumstances reflected in the record, the trial court's decision was clearly erroneous. Any decision would be based on

the particular facts of this case and would have little general application. This Court is well aware of the relentless demands on its time to decide cases of far-reaching impact. This is simply not such a case.

The second reason certiorari review is inappropriate here stems from the standard of review mandated in Batson. As was stated above, the trial court's determination as to the existence of discrimination is to be given great deference on appeal. Petitioner has not shown that the trial court's decision was clearly erroneous. Moreover, a review of that decision, based as it would be on the record as a whole, would best be undertaken by a lower court, as it undoubtedly will be in this death-penalty case.

Petitioner repeatedly argues that the trial court's decision was contrary to various aspects of Ex parte Branch, 526 So.2d 609 (Ala. 1987). In Batson the Court left to the lower courts the task of developing procedures for implementing the holding there, 476 U.S. at 99 n.24, and the Supreme Court of Alabama undertook that responsibility in Branch. This Court, however, has neither approved nor disapproved the various guidelines set forth in Branch. Petitioner's complain before this Court that Branch has been violated is therefore beside the point. Moreover, the Supreme Court of Alabama, surely the highest authority on the dictates of Branch, found no violation of Branch. 543 So.2d 709.[1]

The issue presented in this case is not worthy of certiorari review. For this reason the Court should deny certiorari.

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[1]Petitioner's reliance on Houston v. Alabama, 108 S.Ct. 1724 (1988), is also misplaced. In Houston the State of Alabama moved that the case be remanded to the Court of Criminal Appeals of Alabama for consideration under the newly announced guidelines of Branch. The Court granted certiorari, vacated the judgment, and remanded the case to the Court of Criminal Appeals in light of the State's motion. Houston thus does not stand for anything.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL
BY-

William Duncan Little III

WILLIAM DUNCAN LITTLE III
ALABAMA ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, William Duncan Little III, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 2nd day of October, 1989, I did serve a copy of the foregoing brief and argument on the attorney for petitioner by placing said copy in the United States Postal Service, first class postage prepaid, and properly addressed as follows:

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IN THE ALABAMA SUPREME COURT

FREDERICK LYNN,

APPELLANT

VS.

STATE OF ALABAMA,

APPELLEE

Appeal from the Circuit Court
of Barbour County, Alabama

SC No. 86-1474

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BRIEF AND ARGUMENT OF APPELLANT
ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS
IN 4th DIV., NO. 698

****

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ORAL ARGUMENT REQUESTED

APPENDIX A

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REQUEST FOR ORAL ARGUMENT

Defendant, Frederick Lynn, request oral argument of this appeal for the following reasons:

1. This is a death penalty case.

2. This case involves important questions concerning what constitutes corroboration of the testimony of an accomplice.

3. This case involves important questions concerning the constitutionality of the Alabama death penalty statute.

4. This case involves numerous questions concerning the interpretation of various portions of the Alabama death penalty statute.

5. This case involves an important constitutional question involving the use peremptory strikes to exclude blacks from jury.

Donald J. McKinnon
Attorney for Appellant, Frederick Lynn

TABLE OF AUTHORITIES

Cases:

STATEMENT OF THE CASE

On March 21, 1983, Sgt. A. G. Tew, an Investigator for the Alabama Bureau of Investigation, filed petitions in the Juvenile Court of Barbour County, Alabama, alleging that Frederick Lynn, a sixteen-year-old child, was deliquent. (1c, 2c and 3c of record in 4 Div. 161). In Case Number JU-83-0166, Tew alleged as follows: "The said child is delinquent in that on or about February 5, 1981, Frederick Lynn did knowingly and unlawfully enter or remain unlawfully in a dwelling of Marie Driggers Smith with intent to commit a crime therein, to wit: Theft of property, and while effecting entry or while in the dwelling or in immediate flight therefrom, said defendant was armed with an explosive or deadly weapon, to-wit: a shotgun, in violation of Section 13A-7-5 of the 1975 Code of Alabama, as amended." (1c of record in 4 Div. 161). In Case Number JU-83-0167, Tew alleged as follows: "The said child is delinquent in that on or about February 5, 1981, Frederick Lynn did, in the course of committing a theft of five old coins, one ring and one watch, the property of Marie Driggers Smith, use force against the person of Marie Driggers Smith, with intent to overcome her physical resistance of physical power of resistance, while the said Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, in violation of Section 13A-8-41 of the 1975 Code of Alabama, as amended." (2c of record in 4 Div. 161). In case Number JU-83-0168, Tew alleged as follows: "The said child is delinquent in that on or about February 5, 1981, Frederick Lynn did, in the nighttime, with intent to commit a felony, to-wit: burglary, first degree, knowingly and unlawfully, break into and enter an inhabited dwelling, to-wit: that certain house

located at 539 South Randolph Street, Eufaula, Alabama, which was occupied by Marie Driggers Smith, a person lodged therein and while effecting entry or while in the inhabited dwelling or in immediate flight therefrom, said Federick Lynn was armed with a deadly weapon, to-wit: a shotgun, and during the course of said nighttime burglary, Frederick Lynn did intentionally cause the death of another person, to-wit: Marie Driggers Smith, by shooting her with a shotgun, in violation of Section 13A-5-31 (a) (4) of the 1975 Code of Alabama, as amended." (3c of record in 4 Div. 161).

Also on March 21, 1983, Honorable Sam A. LeMaistre, Jr., District Attorney, filed Motion to Transfer the cases to Circuit Court for the defendant to be tried as an adult. (9c of record in 4 Div. 161). On March 28, 1983, the Juvenile Court of Barbour County, Alabama, issued an order certifying the defendant to stand trial as an adult in all three cases. (10c of record in 4 Div. 161).

On March 31, 1983, the defendant, Frederick Lynn, gave notice of appeal of the certification to the Circuit Court of Barbour County. (16c of record in 4 Div. 161). On April 8, 1983, Honorable Jack W. Wallace, Circuit Judge of Barbour County, Alabama, issued an order certifying Frederick Lynn to stand trial as an adult in all three cases. (22c of record in 4 Div. 161). On April 18, 1983, Frederick Lynn gave notice of appeal of the certification order to the Alabama Court of Criminal Appeals. (24c of record in 4 Div. 161). Frederick Lynn's certification to stand trial as an adult was affirmed by the Alabama Court of Criminal Appeals without opinion. (4 Div. 161).

On April 25, 1983, an indictment was returned by the Grand Jury of Barbour County, Alabama, charging Appellant, Frederick Lynn, as follows (1C-2C in record in 4 Div. 183):

> "The Grand Jury of said County charge that, before the finding of this indictment, and after January 1, 1980, Frederick Lynn, whose name is to the Grand Jury otherwise unknown, did, in the night-time, with intent to commit a felony, to-wit: Burglary, First Degree, knowingly and unlawfully, break into and enter an inhabited dwelling, to-wit: That certain house located at 539 South Randolph Street, Eufaula, Alabama, which was occupied by Marie Driggers Smith, a person lodged therein and while effecting entry or while in the inhabited dwelling or in immediate flight therefrom, said Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, and during the course of said nighttime burglary Frederick Lynn did intentionally cause the death of another person, to-wit: Marie Driggers Smith, by shooting her with a shotgun, in violation of Section 13A-5-31 (a) (4) of the 1975 Code of Alabama, as amended, against the peace and dignity of the State of Alabama."

On May 2, 1983, Appellant, Frederick Lynn was arraigned. At arraignment, Appellant filed an application to be tried as a youthful offender. (7C-8C in record in 4 Div. 183). The application was denied. (8C in record in 4 Div. 183). At arraignment, Frederick Lynn pled "not guilty." The Appellant was tried on May 24 through May 27, 1983. (Caption Sheet, reporter's transcript in record in 4 Div. 183). On May 26, 1983, the jury returned a verdict of "guilty." (RT-369 and RT-372 in record in 4 Div. 183). On May 26, 1983, a sentence hearing was held before the jury. (RT-372 in record in 4 Div. 183). The jury fixed the punishment at death. (RT-404 in record in 4 Div. 183). On May 31, 1983, the Judge held his sentence hearing. (RT-407 in record in 4 Div. 183). The Judge also fixed the punishment as death. (RT-423 in record in 4 Div. 183). On June 30, 1983, Appellant filed alternative motions for judgment of acquittal, in arrest of judgment, or for a new trial. (100C in record in 4 Div. 183). On September 26, 1983, the alternative motions were denied by the Trial Court. (105C in record in 4 Div. 183).

On October 23, 1984, the Alabama Court of Criminal Appeals affirmed Appellant's conviction.

The Alabama Supreme Court granted certiorari; and on July 3, 1985, the Alabama Supreme Court reserved the conviction and remanded the case for a new trial.

The Appellant was retried on March 31 through April 4, 1986. (Caption Sheet, reporter's transcript). On April 4, 1986, the jury returned a verdict of "guilty". (RT-388). On April 4, 1986, a sentence hearing was held before the jury. (RT-390). The jury fixed the sentence at death. (RT-432). On April 9, 1986, the trial judge held a sentence hearing. (RT-434). The trial judge also fixed the sentence at death (RT-439 through 443).

On March 10, 1987, the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County for that Court to make a determination as to whether the prosecution's striking of all blacks on the venire was racially motivated. On May 13, 1987, the Circuit Court held a hearing to determine whether the prosecution's strikes were racially motivated and afterwards ruled that the strikes were not racially motivated. On June 9, 1987, on return to remand, the Court of Criminal Appeals affirmed Lynn's conviction. On July 28, 1987, Lynn's Application for Rehearing was overruled by the Alabama Court of Criminal Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DID THE TRIAL COURT ERR IN FINDING THAT THE PROSECUTION'S STRIKES WERE NOT RACIALLY MOTIVATED?

BATSON vs. KENTUCKY, 106 S. Ct. 1712 (1986)

BLACK v. CURB, 464 F. 2d 165 (1972)

II. DID THE TRIAL COURT ERR IN REFUSING TO PERMIT APPELLANT'S ATTORNEY TO QUESTION DISTRICT ATTORNEY CONCERNING VENIREMEN NOT STRUCK BY THE DISTRICT ATTORNEY?

BATSON v. KENTUCKY, 106 S. Ct. 1712 (1986)

III. DID THE TRIAL COURT ERR IN FAILING TO ORDER THAT THE PROSECUTION NOT USE ITS PEREMPTORY STRIKES IN A MANNER TO EXCLUDE ALL BLACK PERSONS FROM JURY DUTY?

BATSON v. KENTUCKY, 106 S. Ct. 1712 (1986).

SWAIN v. ALABAMA, 380 U.S. 202 (1965).

IV. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN CHALLENGE FOR CAUSE OF INDIVIDUAL WHO WAS SUPERVISOR OF LAW ENFORCEMENT OFFICERS AT TIME SUCH OFFICERS WERE INVESTIGATING THIS CASE?

BROWN v. STATE, 37 Ala. App. 516, 74 So. 2d 273, affd. 261 Ala. 696, 74 So. 2d 277 (1954).

MCADORY v. STATE, 37 Ala. App. 349, 68 So. 2d 68 (1953).

WELCH v. CITY OF BIRMINGHAM, 389 So. 2d 521 (Ala. Cr. App. 1980).

V. DID THE TRIAL COURT ERR IN PERMITTING PROSECUTION WITNESS TO GIVE OPINION THAT VICTIM'S HOUSE HAD BEEN "RANSACKED"?

CENTRAL OF GEORGIA RY. CO. v. ROBERTSON, 206 Ala. 578, 91 So. 470 (1922).

DOUGLASS v. CENTRAL OF GEORGIA RY. CO., 201 Ala. 395, 78 So. 457 (1918).

MCELROY'S ALABAMA EVIDENCE, 3ed, § 128.09.

SOVEREIGN CAMP OF WOODMAN OF THE WORLD v. WARD, 196 Ala. 327, 71 So. 404 (1916)

STANDARD COOPERAGE CO. v. DEARMAN, 204 Ala. 553, 86 So. 537 (1920)

VI. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN OBJECTION TO TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "PRIOR TO SEEING THEM (INVESTIGATORS) DID YOU KNOW THEY WERE COMING?"

BILL STEBER CHEVROLET-OLDSMOBILE, INC., v. MORGAN, 429 So. 2d 1013 (1983).

LOVEMAN, JOSEPH, 7 LOEB v. MCQUEEN, 203 Ala. 280, 82 So. 530 (1919)

STOKLEY v. STATE, 254 Ala. 534, 49 So. 2d 284 (1951).

TRAMMELL v. DISCIPLINARY BD. OF THE ALABAMA STATE BAR, 431 So. 2d 1168 (Ala. 1983).

VII. DID THE TRIAL COURT ERR IN FIALING TO SUSTAIN OBJECTION TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "DO YOU KNOW SHE WAS KILLED ON FEBRUARY 5th OF THAT YEAR?"

CODE OF ALABAMA, 1975, § 12-21-138.

OAKLEY v. STATE, 135 Ala. 29, 33 So. 693 (1903).

VIII. WAS LYNN CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE?

ANDERSON v. STATE, 44 Ala. App. 388, 210 So. 2d 436 (1968).

CALDWELL v. STATE, 418 So. 2d 168 (Ala. Cr. App. 1981), cert. quashed Aug. 27, 1982

DEERMAN v. STATE, 486 So. 2d 515 (Ala. Cr. App. 1986)

HARRIS v. STATE, 420 So. 2d 812 (Ala. Cr. App. 1982).

KELLER v. STATE, 380 So. 2d 926 (Ala. Cr. App.).

KIMMONS v. STATE, 343 So. 2d 592 (Ala. Cr. App. 1977).

LADD v. STATE, 39 Ala. App. 172, 98 So. 2d 56

LEONARD v. STATE, 459 So. 2d 970 (Ala. Cr. App. 1984)

LINDHORST v. STATE, 346 So. 2d 11 (Ala. Cr. App. 1977)

MCCOY v. STATE, 397 So. 2d 577 (Ala. Cr. App. 1981)

MILLS v. STATE, 408 So. 2d 187 (Ala. Cr. App. 1981)

PEACOCK v. STATE, 369 So. 2d 61 (Ala. Cr. App. 1979)

SORRELL v. STATE, 249 Ala. 292, 31 So. 2d 82 (1947).

THOMPSON v. STATE, 374 So. 2d 388 (Ala. 1979).

WOODS v. STATE, 387 So. 2d 313 (Ala. Cr. App. 1979)

IX. SHOULD THE TRIAL HAVE DECLARED A MISTRIAL AFTER DISTRICT ATTORNEY STATED IN ARGUMENT THAT HE BELIEVED WITNESS?

ADAMS v. STATE, 280 Ala. 678, 198 So. 2d 255 (1967).

BLUE v. STATE, 246 Ala. 73, 19 So. 2d 11.

BROWN v. STATE, 393 So. 2d 513 (Ala. Cr. App. 1981)

DUBOSE v. STATE, 148 Ala. 560, 42 So. 862.

HALL v. U. S., 419 F. 2d 582 (5 Cir. 1969).

JETTON v. STATE, 435 So. 2d 167 (Ala. Cr. App. 1983)

KNIGHTEN v. STATE, 35 Ala. App. 524, 49 So. 2d 789 (1951)

MCGHEE v. STATE, 274 Ala. 373, 149 So. 2d 5 (1963)

TARVER v. STATE, 492 So. 2d 328 (Ala. Cr. App. 1986).

WALDROP v. STATE, 424 So. 2d 1345 (Ala. Cr. App. 1982).

WEATHERSPOON v. STATE, 34 Ala. App. 450, 40 So. 2d 910 (1949)

X. WAS IT ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A RANDOM DRAW DOWN OF THE QUALIFIED JURY PANEL IMMEDIATELY PRIOR TO THE MAKING OF PEREMPTORY STRIKES?

CODE OF ALABAMA, 1975, Sec. 12-16-100.

XI. DID THE TRIAL COURT ERR IN ADMITTING INTO EVIDENCE THE BARREL FROM A SAWED-OFF SHOTGUN FOUND AT THE HOME OF APPELLANT'S GRANDMOTHER?

ANDERSON v. STATE, 362 So. 2d 1296 (Ala. Cr. App. 1978)

CUNNINGHAM v. STATE, 22 Ala. App. 583, 118 So. 242.

HUMPHREY v. STATE, 370 So. 2d 344 (Ala. Cr. App. 1979)

MCGUFFIN v. STATE, 178 Ala. 40, 59 So. 635 (1912).

MEANS v. STATE, 51 Ala. App. 8, 282 So. 2d 356.

RUSSELL v. STATE, 54 Ala. App. 452, 309 So. 2d 489 (1974).

TAYLOR v. STATE, 442 So. 2d 128 (Ala. Cr. App. 1983)

WASHINGTON v. STATE, 56 Ala. App. 555, 323 So. 2d 738 (1975).

WILLIAMS v. STATE, 384 So. 2d 1205, (Ala. Cr. App. 1980).

XII. IS THE ALABAMA DEATH PENALTY STATUTE UNCONSTITUTIONAL AS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND OF ALABAMA?

XIII. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION THAT THE APPELLANT RECEIVE TWO STRIKES FOR EACH ONE STRIKE FOR THE STATE IN JURY SELECTION?

CODE OF ALABAMA 1975, Sec. 12-16-100.

U. S. CODE, Title 42.

XIV. WHEN COMPARED WITH SIMILAR CASES, THE DEATH PENALTY IS INAPPROPRIATE IN THIS CASE.

BUSH v. STATE, 431 So. 2d 555 (Ala. Cr. App. 1982)

CLISBY v. STATE, 456 So. 2d 86 (Ala. Cr. App. 1982)

EVANS v. STATE, 361 So. 2d 654 (Ala. Cr. App. 1977).

EX PARTE BELL, 475 So. 2d 609 (Ala. 1985).

EX PARTE FLOYD, 486 So. 2d 1321 (Ala. 1986).

EX PARTE HARRELL, 470 So. 2d 1309 (Ala. 1985)

EX PARTE JEFFERSON, 473 So. 2d 1110 (Ala. 1985).

EX PARTE JONES, 456 So. 2d 380 (Ala. 1984).

EX PARTE KENNEDY, 472 So. 2d 1106 (Ala. 1985).

EX PARTE THOMAS, 460 So. 2d 216 (Ala. 1985).

LINDSEY v. STATE, 456 So. 2d 383 (Ala. Cr. App. 1983).

LYNN v. STATE, 477 So. 2d 1365 (Ala. Cr. App. 1984).

RITTER v. STATE, 475 So. 2d 266 (Ala. Cr. App. 1978).

EX PARTE DUREN, 507 So.2d (Ala. 1987).

EX PARTE GRAYSON, 479 So. 2d 76 (Ala. 1984).

EX PARTE HUBBARD, 500 So. 2d 1231 (Ala. 1986).

EX PARTE TARVER, 500 So. 2d 1256 (Ala. 1986).

EX PARTE THOMPSON, 503 So. 2d 887 (Ala. 1987).

EX PARTE WATKINS, 509 So. 2d 1065 (Ala. 1984).

SUMMARY OF TRIAL COURT RULINGS AND
ACTIONS ADVERSE TO APPELLANT

Record Page No.	SUMMARY
8C, RF10, RT-11,	Motion in Limine denied, related to Defendant's possession of guns at other times.
9C, RT-11,	Motion for case to be tried as non-Capital case denied.
10C, RT-10,	Motion for reduction of jury panel denied.
11C,RT-16,	Portion of discovery motion denied.
13C, RT-8	Denial of Motion to enjoin Prosecutor from utilizing his Peremptory challenges to exclude blacks from jury panel.
15C, 16C, RT-8	Denial of Motion for additional Peremptory challenges.
17C, RT-4, RT-5	Denial of Motion to prohibit state from using it's Peremptory strikes to exclude Negroes from jury.
19C	Denial of Motion to prohibit death qualification of prospective jurors or for separate jury for Guilt and Punishment Phase.
26C, RT-5	Denial of Motion for separate juries for Trial and Penalty Phases.
27C, RT-5, RT-6, RT-24	Denial of Motion for psychiatric evaluation.
28C, RT-7	Denial of Motion for individual Voir dire.
40C, RT-22,	Denial of Motion for continuance.
42C, RT-23,	Denial of Motion for change of verdict.
43C, RT-313, RT-314	Denial of Motion to exclude State's evidence.
67-C, RT-320	Refusal of proposed charge #22.
68-C, RT-320	Refusal of proposed charge #23.

Record Page No.	SUMMARY
69-C, RT-320	Refusal of proposed charge #25.
70-C, RT-320	Refusal of proposed charge #26.
86-C, RT-430, RT-431	Refusal of proposed charge #3 (Sentence phase).
87-C, RT-430, RT-431	Refusal of proposed charge #14 (Sentence phase).
88-C, RT-431	Refusal of proposed charge #15 (Sentence phase).
89-C, RT-431	Refusal of proposed charge #16 (Sentence phase).
116-C	Denial of post-trial Motion.
117-C	Denial of Motion based on Batson vs. Kentucky.
RT-47, RT-101	Denial of challenge for cause of prospective juror Bradshaw.
RT-61, RT-62, RT-108	Denial of challenge for cause of prospective juror Gissandaner.
RT-66, RT-67	Excusal of prospective juror Mahone.
RT-69	Denial of challenge for cause of prospective juror Little.
RT-113, RT-114	Denial of challenge for cause of prosective juror Sowardi.
RT-132	Surtaining of state's objection to suggestion of parole possibility for co-Defendant who testified for State.
RT-138	Overruling objection to Gory Photograph (ex. #3).
RT-146	Overruling objection to witness characterization of house as "ransacked".
RT-147	Overruling objection to Gory Photograph (Ex. #4).
RT-157, RT-158	Overruling objection to question.
RT-158	Overruling objection to question.
RT-190, 191, 212, 213	Overruling objection to gun barrel's admission.

Record Page No.	SUMMARY
RT-195	Sustained objection to defense question. (Witness in trouble).
RT-195	Sustained objection to defense question. (Other criminal activities).
RT-196	Sustained objection to defense question.
RT-203	Sustained objection to defense question.
RT-240	Sustained objection to defense question.
RT-277	Overruled objection to question.
RT-278	Overruled objection to question.
RT-292	Overruled objection to leading question.
RT-308	Overruled objection to Gory Photograph. (Ex. #28).
RT-309	Overruled objection to Gory Photograph. (Ex. #29).
RT-310	Overruled objection to Gory Photograph. (Ex. #30).
RT-318, RT-319	Denial of Motion for directed verdict of Acquittal.
RT-340	Sustained objection to defense argument.
RT-353, 354, 355	Denied Motion for mistrial.

(These are rulings made after remand and the references are to supplemental record)

RECORD PAGE NO. ON REMAND	SUMMARY
R-15 & 16	The Trial Court refused to allow the Appellant to cross-examine the District Attorney concerning individuals not struck by the District Attorney.
R-24 & 25	The Trial Court refused to allow the Appellant to cross-examine the District Attorney concerning individuals not struck by the District Attorney.
R-32 & 33	The Trial Court ruled that the State met its burden of proving that its strikes were not racially motivated.

STATEMENT OF FACTS

The defendant did not testify and did not submit testimony relating to the time of the offense. The following statement of facts (97-C through 104-C) is taken from the Trial Court's finding of facts (without admitting the correctness of name):

"On February 6, 1981, the body of Marie Driggers Smith, an elderly widow, was found in her home located at 539 South Randolph Avenue in the City of Eufaula, Barbour County, Alabama. The first law enforcement officer to arrive on the scene, Captain Ted Dotson with the Eufaula Police Department, determined that Mrs. Smith was dead and that because of the excessive amount of blood on her body and near her body and because of the ransacked condition of the house, he suspected foul play was involved. Law enforcement officers from the Alabama Bureau of Investigation and the State of Alabama Department of Forensic Sciences and the Barbour County District Attorney's Office were called to aid in the investigation of this crime. Drawers had been pulled out and the contents thereof strewn throughout the house. Attempts were made to lift fingerprints from all of these items."

"An autopsy was conducted on the body of the victim and the results revealed that the victim was killed by a shotgun wound to the face. Additional findings showed that the victim had superficial incise wounds at the left wrist and right hand. Examination of the portions of the shell that was found in the body of the victim revealed that the victim had been shot with a twenty gauge shot shell slug."

"Gary Marcus Strong, an admitted accomplice to this crime, took the stand and testified for the State. Prior to testifying, Strong had pled guilty to Burglary

in the First Degree in connection with this crime and had been sentenced to thirty years in the penitentiary. Strong related that in September of 1982 he learned that he was wanted for questioning and that he turned himself into the Eufaula Police Department shortly thereafter. His fingerprints had been found inside the victim's home and he gave a confession to his participation in this crime and implicated the Defendant, Fredrick Lynn, as the trigger man. Strong testified that on Thursday, February 5, 1981, the Defendant came to his house in Chattahoochee Courts, a housing project for low-income families, is located approximately two blocks from the victim's residence. He testified further that he and the Defendant left his home shortly after 6:00 p.m. and went to Hardee's to eat. After eating, Strong and Lynn went to Laurie Daniels' house, located in Chattahoochee Courts, where Terry Green was visiting. Strong testified that Lynn had told him that he had put a sawed-off shotgun in Terry Green's car and wanted to pick it up and take it somewhere to sell it. Strong accompanied Lynn to the Daniels' residence and there Lynn took the sawed-off shotgun out of the trunk of Terry Green's car. Strong testified the gun was sawed-off at both ends and had tape around the stock. He testified that they left Chattahoochee Courts walking down South Randolph Avenue in the direction of town and toward the victim's house. As they passed in front of the victim's house it was noted that a light in the front room went off and Fredrick Lynn told Strong, "Let's stop here and check this out." Strong then testified that a few moments later Fredrick Lynn took the screen off a window in the front portion of the house and raised the window and entered the house. At this time, Lynn told Strong to meet him at the back door. Strong proceeded to the back door and a few moments later Lynn opened it and told him to come inside. Strong testified that at this time Lynn had the sawed-off shotgun held on the victim. Strong testified further that Lynn ordered the victim

that if she tried to escape again that he would kill her. Strong further testified that shortly after this he thought he heard a car or saw the headlights of a car outside the house and went to the back door to look. He didn't see anything and when he came back into the middle portion of the house Lynn told him to go in the next room and turn the television up very loud. Strong testified that he did so and after he had turned the volume up on the television he heard a gun shot and ran out of the house. He testified that as he ran out the back door he looked into the room where the Defendant and victim were and the Defendant was standing over the victim with the shotgun pointed at her. Strong testified that he ran home and hid the items that he had taken during the crime, these items included a wristwatch, a ring and some old coins. After doing this, Strong proceeded to a nightclub called the Casino Club where he met Fredrick Lynn and they joined Terry Green and Herbert Bouyer. At about closing time, 1:30 a.m., Strong testified that he, Lynn, Bouyer, and Green left the club together. He testified that he was taken to his house first and that he got out to go home for the night. The Defendant also got out at this point and went behind Strong's house and returned to Green's car with a sawed-off shotgun in his hand."

"Investigator Earlie Dinkins of the Eufaula Police Department testified that he conducted a consent search of the residence of Mrs. Rencie Lynn on the Gammage Road, Eufaula, Alabama, on March 4, 1981. Mrs. Rencie Lynn is the grandmother of Fredrick Lynn and evidence showed that Fredrick Lynn was living with her at this address on March 4, 1981. During the search a sawed-off barrel from a twenty gauge shotgun was obtained from a trash can in the carport area of the house and a twelve gauge shotgun that had been sawed-off at both ends was also found."

"Terry Green testified that on February 5, 1981, he was a Senior at Eufaula High School and attended school that day. He testified that he received a message

to pick up Fredrick Lynn at his grandmother's house after school and that he did so. The evidence revealed that Fredrick Lynn had a blue sweater with something wrapped in it when he came out of his house on February 5th, and got into Terry Green's car. The Defendant got Green's keys and put the sweater and what was subsequently revealed to be the sawed-off shotgun in the trunk of the car. Green described the gun as being sawed-off on both ends and as having tape around the butt of the gun. Green testified that later in the day he and the Defendant went to the playground area of Chattahoochee Courts where the Defendant got Green's keys, opened the trunk and got out the sawed-off shotgun and was showing it off to the people present at the playground. He also showed the people there that he had ammunition for the gun in his possession. Green testified that they stayed at the playground for approximately an hour and that he then went to visit his girlfriend, Laurie Daniels, at her residence. Before leaving the playground, Lynn wrapped the gun back in the sweater and placed it back in the trunk of Green's car. Green testified that later that evening, at approximately 8:00 p.m., Lynn came to Ms. Daniels' residence and got his car keys and went to the trunk. He testified that when Lynn brought the keys back to him after going to the trunk the Defendant was wearing the blue sweater in which the shotgun had been wrapped earlier. Green further testified that at approximately 11:00 p.m. he left Ms. Daniels' residence. Before leaving, Green went to his trunk to get out a water bottle as he had leaking radiator, and when he opened the trunk noted that the shotgun was not in the trunk. He testified that he went from Ms. Daniels' residence to Hardee's where he picked up Herbert Bouyer and from there they proceeded to the Casino Club. He testified that when he and Herbert Bouyer got to the Casino Club, Gary Strong and Fredrick Lynn were already there and that Lynn and Strong came over to where they were sitting and joined them at their table. Evidence

revealed that the four left the Casino Club as it closed at approximately 1:30 a.m. and proceeded to Gary Strong's house. Green testified that Strong got out to go home at this time and that Lynn got out also and told Terry Green to wait for him as he had to go get something. He testified that he did not see where Lynn went or what he had with him when he came back. From there evidence showed that Green next took Bouyer to his car which was at Hardee's. From there Green and the Defendant went to the Omelet Shoppe and had something to eat and then proceeded to Gammage Road to take the Defendant home. As the Defendant got out of the car at his residence at Gammage Road, he reached under the seat of the car and pulled out the sawed-off shotgun and took it inside with him."

"Herbert Bouyer, who is currently in the Air Force and stationed in England, testified that on February 6th, he went to Fredrick Lynn's residence to visit Mrs. Rencie Lynn and Fredrick. He testified that he had a conversation with Fredrick Lynn on this date at approximately 10:00 a.m. and that the subject of the conversation was a sawed-off shotgun, which Lynn showed to Bouyer that day. Bouyer described the gun as being sawed-off on both ends and having tape on the stock. Bouyer testified that Lynn asked him to "take him somewhere to dispose of the gun", and that he refused to do so."

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT THE DISTRICT ATTORNEY'S STRIKES WERE NOT RACIALLY MOTIVATED.

Based on the decision of the United States Supreme Court in the case, Batson vs. Kentucky, 106 S. Ct. 1712 (1986), the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County, Alabama.

On remand, the District Attorney stated reasons for the use of each of his peremptory strikes on black veniremen. Some of the reasons were as follows: (1) Juror related to a criminal; (2) The juror lived in a particular area, (3) The juror was a co-worker of a witness or other participant in the trial; and (4) The juror knew one of the prosecution's witnesses and might not believe that witness because of his bad reputation. (R-5 through R-14 Supplemental record).

In a small county (population wise) like Barbour County, the types of reasons given could be applied to the vast majority of the population. Barbour County consists of two divisions, and the Eufaula Division of the County consists of only about 16,000 people with about 14,000 being in Eufaula itself. The Court refused to permit cross-examination of the District Attorney as to how similar factors might have applied to jurors that he did not strike; but it is submitted that the same types of reasons could have been applied to any member of the venire.

If there were only two or three blacks on the venire, it could easily be coincidence that all of them were eliminated by the prosecution. However, when all 11 blacks out of a qualified panel of 38 are eliminated, it simply cannot be coincidence, but is clearly racial discrimination supported by excuses. The test should be results oriented. Black v. Curb, 165 F.2d 165 (1972). Reasons for peremptory strikes are so vague and numerous that race-independent excuses can always be provided - one must look at the results. Otherwise, the holding of the U. S. Supreme Court in Batson vs. Kentucky, 106 S. Ct. 1712 (1986) can be reduced to pure sham.

ARGUMENT

II.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT'S ATTORNEY TO CROSS-EXAMINE THE DISTRICT ATTORNEY AS TO VENIREMEN NOT STRUCK BY DISTRICT ATTORNEY.

In order to judge the sincerity of the race-independent reasons given by the District Attorney for his strikes of blacks, it is essential that the District Attorney be extensively examined concerning whether similar reasons might not have been applicable to white jurors who were not struck by the District Attorney. This line of examination was cut off completely by the Trial Court. (R-15, R-16, R-24, R-25, & R-26). By cutting off this line of questioning, the Trial Court deprived itself of critical information needed to perform its"duty to determine if the Defendant has established purposeful discrimination." Batson vs. Kentucky, 106 S. Ct. 1712 (1986).

ARGUMENT

III.

THE TRIAL COURT ERRED IN FAILING TO ORDER THAT THE PROSECUTION NOT USE ITS PEREMPTORY STRIKES IN A MANNER TO EXCLUDE ALL BLACK PERSONS FROM JURY DUTY.

For many years, there was no restriction whatsoever on the prosecution's use of its peremptory strikes. Then the rule developed that a defendant could attack the prosecution's use of peremptory strikes to exclude jurors because of race only if there was a pattern of so using peremptory strikes. Swain v. Alabama, 380 U. S. 202 (1965). In Batson v. Kentucky, 106 S. Ct. 1712 (1986), the U. S. Supreme Court ruled that requiring proof of a pattern posed an unrealistic burden on defendants. The Court ruled that it was no longer necessary for a defendant to show a pattern. It is only necessary to show only that the prosecution excluded all blacks in the case at bar. At that point, the burden shifts to the prosecution to show justifications for the strikes other than race.

Based on the holding of the United States Supreme Court in the case, Griffith v. Kentucky, No. 85-5221 (Jan. 13, 1987), that Batson applied retroactively, the Alabama Court of Criminal Appeals ordered the case remanded to the Circuit Court of Barbour County for a hearing to determine whether the State's use of its strikes was racially motivated. The State provided superficial, vague justifications not subject to any real means of attack. The defendant was precluded from examining the District Attorney concerning whether the same justifications would not have been

equally applicable to blacks not struck.

This late justification of strikes, coming months after jury selection is just not sufficient to meet constitutional standards - especially in view of the fact that the defendant warned the Court that the State, unless enjoined, would get an all-white jury. Based on the past experience in serious cases, this prophecy required little insight.

If the Trial Court had granted defendant's motion and told the District Attorney that he must leave 2 or 3 blacks on the jury, there would be no problem in trying to analyze the District Attorney's conscious and subconscious motives in eliminating veniremen.

An even better solution would be to have some sort of proportional representation in counties with signigicant minorities - upon Motion of defendant. For example, if a county is one-third black, then he should be allowed to have four black jurors, if he wishes. The four could be selected from among all of the blacks qualified to sit on the case, while the other eight could be selected from the balance of the qualified veniremen. Each attorney could keep his reasons for striking jurors secret, and noone would be put in the awkward position of attacking the honesty, integrity, or fairness of a prosecutor.

ARGUMENT

IV.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN CHALLENGE FOR CAUSE OF INDIVIDUAL WHO WAS SUPERVISOR OF LAW ENFORCEMENT OFFICERS AT TIME SUCH OFFICERS WERE INVESTIGATING THIS CASE.

In the course of qualifying jurors, prospective juror Little disclosed that, at the time of the alleged homicide, he was Mayor of the City of Eufaula and supervisor of police officers investigating the crime. (RT-68-69). Although Mayor Little denied that his former supervisory relationship over the witness would affect his ability to be fair, it is submitted that the existence of such a relationship itself establishes implied bias. McAdory v. State, 37 Ala. App. 349, 58 So. 2d 68 (1953); Brown v. State, 37 Ala. App. 516, 74 So. 2d 273, affd. 261 Ala. 696, 74 So. 2d 277 (1954).

Research discloses no case involving a challenge for cause under these exact circumstances. However, the case, Welch V. City of Birmingham, 389 So. 2d 521 (Ala. Cr. App. 1980), is quite instructive on the principles involved.

In Welch, the defendant was tried and convicted in city court of selling alcoholic beverages without a license. He was convicted and appealed for a trial de Nova before a circuit court jury. When the jury was being qualified, defendant challenged for cause an employee of the city's engineering department. The defendant was convicted; and his conviction was reversed by the Court of Criminal Appeals because of the Trial Court's failure to sustain the challenge for cause, based on the juror's employment.

In the present case, the City of Euraula is not officially a party since the city cannot officially prosecute felonies. However, it is a "city case" in the sense that the investigation was commenced by city forces and two of the prosecution's key witnesses were city employees (at present and at the time of the offense). When the investigation was made, prospective juror Little was Mayor and supervised the City policemen who were participating in the investigation. Although the name "City of Euraula" is missing from the caption, the City's interest in conviction is at least as strong as in the Welch case.

Moreover, in the Welch case, the prospective juror was in no way involved in enforcement of liquor laws; while, in the present case, the prospective juror had been mayor and, as such, supervised all aspects of city government, including law-enforcement.

It is therefore error for the trial court to have overruled the challenge for cause of Mayor Little. The error, of course, is not harmless. This error on the part of the trial court warrants reversal of Lynn's conviction.

V.

THE TRIAL COURT ERRED IN PERMITTING PROSECUTION WITNESS TO GIVE OPINION THAT VICTIM"S HOUSE HAD BEEN "RANSACKED"

In direct examination, the District Attorney asked witness A.G. Tew (an investigator): "What condition did you find the rooms in that house to be?" Sgt. Tew responded: "They were ransacked." (RT-146).

Sgt. Tew's answer was not responsive to the District Attorney's question. According to Webster's New World Dictionary, "ransack" is a verb meaning "1. to search thoroughly; examine every part in searching. 2. to search through for plunder; pillage." Thus, instead of describing the scene, Mr. Tew gave his opinion of what happened at the scene prior to his arrival, i.e., someone had searched it thoroughly. His opinion as to the cause of the room's condition was clearly inadmissable. McElroy's Alabama Evidence, 3 ed, §128.09; Standard Cooperage Co. v. Dearman 204 Ala. 553, 86 So. 537 (1920); Central of Georgia Ry. Co. v. Robertson,206 Ala. 578, 91 So. 470 (1922); Douglass v. Central of Georgia Ry.Co., 201 Ala. 395, 78 So. 457 (1918); and Sovereign Camp of Woodmen of the World v. Ward, 196 Ala. 327, 71 So. 404 (1916).

The objection was made immediately upon the illegal testimony. The objection was fully justified: "Mr. McKinnon; (Interposing) Your Honor, I object to the word "ransacked". It is a conclusion for the jury. It is a characterization of the activity that caused it (the mess)." (RT-146). The objection was overruled without explanation.

The Trial Court clearly erred in not sustaining the objective and giving a curative charge. The error cannot be regarded as harmless. under the indictment (1-6) it was incumbent upon the State to prove a burglary as a part of the intentional killing incident. The plundering or ransacking would strongly support the State's position that there was a burglary. The witness' invasion of the province of the jury meant that the jury did not have to form its own conclusion from a detailed description of the scene; and this invasion effectively deprived the defendant of the right to a trail by jury on a key factual issue.

ARGUMENT

VI.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN OBJECTION TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "PRIOR TO SEEING THEM(INVESTIGATORS) DID YOU KNOW THEY WERE COMING?"

It has been a fundamental principle in Alabama trial practice that a party may not attempt to bolster a witness' credibility until that witness' credibility is attacked. In the trial of the case at bar, this principle was violated repeatedly over the stated objections of defendant. The trial court permitted an investigator to describe in detail his efforts to locate a witness and to explain that the witness did not know that he was coming. (RT-157-158). The Trial Court allowed the District Attorney to ask a witness: "Prior to seeing them (investigators) did you know they were coming?" (The answer was "No.") RT-278. Witness Green was given an opportunity to deny bias before his being accused of bias. RT-277.

The most flagrant example of improper bolstering of a witness' testimony was the District Attorney's question to Terry Green, "Did you know they were coming?" This bolstering of the witness' testimony violates a long-established principle of Alabama law. Trammell v. Disciplinary Bd. of the Alabama State Bar, 431 So. 2d 1168 (Ala. 1983); Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan, 429 So. 2d 1013 (1983); Stokley v. State, 254 Ala. 534, 49 So. 2d 284 (1951; and Loveman, Joseph, and Loeb v. McQueen, 203 Ala. 280, 82 So. 530 (1919). Since Terry Green, the witness being bolstered, was a key witness for the State, it cannot be said that the Trial Court's error was harmless.

ARGUMENT

VII.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN OBJECTION TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "DO YOU KNOW SHE WAS KILLED ON FEBRUARY 5th OF THAT YEAR?"

Perhaps the most elementary rule of trial practice is the one forbidding the leading of witnesses on direct examination. (Code of Alabama, 1975, § 12-21-138). It is reversible error for a trail court to abuse its discretion by allowing a highly prejudicial leading question. Oakley v. State, 135 Ala. 29, 33 So. 693 (1903).

ARGUMENT
VIII.
LYNN WAS CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

The only direct evidence of Frederick Lynn's alleged involvement in the killing of Marie Driggers Smith was the testimony of Garrett Marcus Strong, an admitted accomplice. (RT-221-266). This testimony was supposedly corroborated by the testimony of witnesses, Terry Green and Herbert Bouyer and by the discovery of a sawed-off barrel at the home of Appellant by law-enforcement officers several weeks after the homicide. (RT-266-303 and 189-191).

The accomplice, Garret Marcus Strong, and the corroborator, Terry Green, proved to be quite flexible in conforming their testimonies to the needs of the prosecution, in spite of having previously made statements that were quite inconsistent with each other. In his statement dated September 23, 1982, Strong said that he had already left the house and was back in the yard when he heard a shot fired. (23E-25E). In his testimony, he said that he was still in the house when he heard the shot. (RT-234. In his statment, Strong said that after the shooting, he did not see Frederick Lynn until the next day. (23E-25E). In his testimony, he stated that he saw Frederick later that same night at the Casino Club. (RT-23S). In his statement, Strong stated that Appellant had taken the coins, ring, and watch from Mrs. Smith and that Appellant told Strong the next day about having those items. (23E-25E). In his testimony, on the other hand, Strong stated that he personally had taken those items and gave those items to Frederick Lynn the next day. (RT-237-238). There are numerous other inconsistencies between Strong's statement and his testimony, but these are the major ones.

When confronted with these and other inconsistencies on the witness stand, Strong said, "... me and my lawyer had straightened all that out." (RT-184, 187 in 4 Div. 183). At the last trial he again indicated his lawyer helped him straighten out his story. (RT-243). Of course, these changes were necessary to make Strong's statement correspond to that portion of Terry Green's statement in which Terry indicated that he later on the night of the homicide saw Frederick Lynn and Garrett Marcus Strong together at the Casino Club. (26E-29E).

Even the prosecution's great corroborator, Terry Green, gave a statement and testimony which were inconsistent with each other in many ways. In his statement, Terry Green was unable to pinpoint the time any better than "sometime during the first part of 1981." (26E-29E). In his testimony at the first trial, he narrowed it down to February 5, 1981. (Rt-239 in 4 Div. 183). At the first trial,he said that he was able to pin it down because he remembered all of the kids at school talking about the homicide the dary after it happened. (RT-252-253 in 4 Div. 183). School records show that he was not even at school on that day when all of the kids were supposedly talking about the murder. (RT-315-317). In his statement, Terry Green stated he left school between 1:00 and 2:00, while in his testimony at the first trial, he stated he left school at about twelve noon. (26E-29E, RT-61 from 4 Div. 183). In his testimony at the second trial, he narrowed it down to the day Mrs. Smith was killed. (RT-267). As with Strong, law enforcement people helped him get his statement straightened out. (RT-261 in 4 Div. 183). At the second trial, he said other witnesses helped him straighten his story out (RT-288). In his testimony at the first trial, Terry Green stated that, when he left the Casino Club, he left Garrett Marcus Strong and the Appellant, Frederick Lynn, standing outside the club; but, after additional conferring with law-enforcement officers, he decided he did not

leave them standing outside the club but instead gave them a ride home. (RT-274, 26-29E). In addition, at the time he gave his statement he did not "remember" going to Hardees and did not remember seeing Appellant, Frederick Lynn, get a sawed-off shotgun from under the front seat of the car (RT-272 in 4 Div. 183). During one part of his testimony, Terry Green might actually have been telling the truth, and that is when he said that he personally did not know a thing about what happened at the home of Marie Driggers Smith. (RT-273 in 4 Div. 183). In this case, we face a significant possibility of a miscarriage of justice. There is a strong possibility that Terry Green knew exactly what happened at the home of Marie Driggers Smith--because he might well have been there himself. Could Terry Green's great flexibility in his testimony have possibly resulted from the State's promise of immunity and $10,000.00 in reward money? (35 and 36E). Clearly, reasonable doubt exists in this case as a matter of law.

The other great corroborator is Herbert Bouyer. Unfortunately, Appellant did not have a statement from Bouyer to compare with his testimony. Many of the changes made in the testimony of Strong and Green were obviously made to correspond with the testimony of Bouyer. There were two facets to Bouyer's testimony, one being his testimony that he, Terry Green, Garrett Marcus Strong, and Appellant, Frederick Lynn, all left the Casino Club together on the night of February 5, 1981. (RT-294). The other facet of Mr. Bouyer's testimony was that Appellant, Frederick Lynn, asked Bouyer on February 6, 1981, for help in getting rid of a gun. (RT-296-297). He was unable to provide any description of the gun other than its being sawed-off and having tape around the stock. He knew nothing about the gauge. (RT-296-297). In connection with Herbert Bouyer's testimony, there arose one of the strangest coincidences to occur during the

trial. The very same records which proved that Terry Green was absent from school on February 6, 1981, when he testified he heard everybody talking about the homicide, showed that Herbert Bouyer was present at school at the time he was supposedly talking with Appellant, Frederick Lynn, about getting rid of the gun. (R-315-217). Would that be that we had a statement from Bouyer to compare with his testimony!

Appellant does not question the truthfulness of the only remaining corroborative testimony which consists entirely of the fact that law-enforcement officers discovered gun parts at the residence of Frederick Lynn several weeks after the homicide. (RT-189-190). However, since those gun parts could not in any way be identified as being related to the weapon causing the death of Marie Driggers Smith, that evidence cannot be considered to be corroboration.

Naturally, if one believes the testimony of Garrett Marcus Strong (forgiving the inconsistencies), it would constitute evidence of Appellant's guilt, even though Strong denied having seen the fatal shot. (RT-233-234). Fortunately, however, the law requires that the testimony of an alleged accomplice be corroborated. Garrett Marcus Strong is just the kind of individual for which the corroboration statute was written. He got caught; he did not want to face the full, just consequences of his crime; and, in order to escape the full, just consequences of his crime, he put the finger on someone else.

If you try to ignore the gross inconsistencies in the State's corroborative testimony and interpret it in a manner most favorable to the State, you have the following matters that could be considered corroborative to a certain extent:

1. The Appelant, Frederick Lynn, was with the accomplice within two or three hours before the alleged homicide.

2. The Appellant was with the alleged accomplice two or three hours after the alleged homicide.

3. The Appellant was in possession of a sawed-off shotgun, unknown gauge, two or three hours before the alleged homicide.

4. The Appellant was in possession of a sawed-off shotgun, unknown gauge, within two or three hours after the alleged homicide.

5. On the day after the alleged homicide, Appellant requested the assistance of Herbert Bouyer in disposing of a sawed-off shotgun, gauge unknown.

6. About four weeks after the alleged homicide, a barrel from a 20-gauge shotgun was discovered at Appellant's residence, but no testing could certify that the barrel came from the particular gun with which Marie Driggers Smith was shot.

In connection with Frederick Lynn's having been seen with the alleged accomplice, Garrett Marcus Strong, before and after the alleged homicide, the first two "corroborating" matters, it should be noted that Terry Green and very likely other individuals would have been with Frederick Lynn before and after the homicide. People who run in the same circles are very likely to run into each other several times in a night, expecially in places like the public housing project and juke joints like the Casino Club. Frederick Lynn and Garrett Marcus Strong were not seen together at unusual times and places, or in proximity of the homicide, considering the layout and traffic pattern of Eufaula. Gooney's house where Terry Green said he was with his girlfriend, Garrett Marcus Strong, and Appellant, Frederick Lynn, was on Randolph Street -- the second longest North-South route in town. (RT-141). To get to Hardees, Kentucky Fried Chicken, and numerous other

nearby businesses as well as most of the rest of Eufaula from the project, one has to cross or go up or down Randolph Street. Terry Green testified that, Frederick Lynn and Garrett Marcus Strong then left Gooney's house in the project, but that he did not know where they went. (RT-272). However, he could not even see in the direction of the home of Marie Driggers Smith.

The next two "corroborating" matters consist of Appellant's alleged possession of a sawed-off shotgun before and after the homicide which is not truly corroboration of his commission of the homicide. First, that possession was not shown to have been exclusive. Any number of people could have had access to the gun described by Terry Green. (RT-266-290 and 26-29E). Second, other than the "sawed-off" description, there was no descriptive or ballistic information to identify it with the fatal weapon. Finally, the only evidence that the fatal weapon was a sawed-off shotgun was Garrett Marcus Strong's testimony.

The fifth "corroborating" matter is Frederick Lynn's alleged request that Herbert Bouyer help him dispose of a sawed-off shotgun, the day after the death of Marie Driggers Smith. This likewise is not "corroboration" of Frederick Lynn's supposed participation in the homicide. Again, there is no description other than "sawed-off" and nothing to related it to the death of Marie Driggers Smith. Herbert Bouyer's testimony could be used to show an awareness of guilt in general but could not show guilt of a specific crime. In addition, the setting was too remote in time and place to otherwise connect Frederick Lynn with the death of Marie Driggers Smith.

The sixth and final matter of "corroboration" was the sawed-off barrel, but its discovery four weeks later far from the death scene provides no corroboration. Gauge is the only thing to identify it with the fatal weapon.

If one is looking for corroboration of Frederick Lynn's possession of illegal sawed-off shotguns, then there would be sufficient corroboration; but, if one is looking for corroboration of Garrett Marcus Strong's testimony that Frederick Lynn shot Marie Driggers Smith, then there is absolutely no corroboration. There is nothing other than Garrett Marcus Strong's testimony that links Frederick Lynn to the alleged murder of Marie Driggers Smith.

Although the corroboration matters submitted are fairly consistent with Garrett Marcus Strong's testimony, they are also equally consistent with Frederick Lynn's innocence.

In the present case, as in Mills v. State, 4 08 So.2d 187 (Ala. Cr. App. 1981), "there is no item of evidence, standing alone and apart from the accomplice's testimony explaining that evidence which tends to connect the appellant with the crime." The six corroborative matters in this case are virtually meaningless without Strong's testimony explaining how it all fits together. That falls far short of complying with the requirements of the law.

> "The tendency of the corroborative evidence to connect accused with the crime, or with the commission thereof, must be independent, and without the aid, of any testimony of the accomplice; the corroborative evidence may not depend for its weight and probative value on the testimony of the accomplice, and it is insufficient if it tends to connect accused with the offense only when given direction or interpreted by, and read in conjunction with, the testimony of the accomplice." 23 C.J.S. Criminal Law, Section 812 (b) (1961).

The Trial Court failed to follow the rule announced by the Court in Sorrell v. State, 249 Ala. 292, 31 So. 2d 82 (1947):

> "The corroboration necessary to support the testimony of an accomplice must be of some fact tending to prove the guilt of the accused. It is not sufficient if it is equivocal or uncertain in character and must be such that legitimately tends to connect the defendant with the crime. It must be of substantive character, must be inconsistent with the innocence of the accused and must do more than raise a suspicion of guilt...."

This rule has been reiterated again and again by both this Court and the Supreme Court. Caldwell v. State, 418 So.2d 168 (Ala. Cr. App. 1981), Cert. Quashed Aug. 27, 1982; Lindhorst v. State, 346 So.2d 11 (Ala. Cr. App. 1977), cert. denied, 346 So.2d 18 (Ala. 1977); Kimmons v. State, 343 So.2d 542 (Ala. Cr. App., 1977); Anderson v. State, 44 (Ala. App. 388, 210 So.2d 436, 1968); Harris v. State, 420 So.2d 812 (Ala. Cr. App., 1982); and McCoy v. State, 397 So.2d 577 (Ala. Cr. App., 1981), cert. denied, 397 So.2d 589.

"Evidence which logically and rationally is as consistent with innocence as with guilt does not corroborate the testimony of an accomplice." McCoy v. State, 397 So.2d 577, (Ala. Cr. App., 1981); cert denied, 397 So.2d 589 (Ala., 1981); also Ladd v. State, 39 Ala. App. 172, 98 So.2d 56, cert striken, 266 (Ala. 586, 98 So.2d 59,1957); and Sorrell v. State, 249 (Ala. 292, 31 So2d 82, 1947).

The evidence in Frederick Lynn's case compels the same conclusion that the Supreme Court reached in Sorrell v. State, supra:

> "True, there are circumstances in the case which might be calculated to arouse the curious mind to wonder why they occurred, if defendant were wholly innocent of wrongdoing, but when considered in the light of the governing princi;les of law above deduced, it is clear the evidence was wanting in the legal requisites necessary to sustain the conviction. The conviction rested on surmise, speculation and conjecture, and the ends of justice require us to enter a reversal..."

If the rule that corroborative evidence must do more than raise a suspicion of guilt applies to any case, it applies to Frederick Lynn's case. "Suspicion cannot be heaped upon suspicion to create a reasonable inference of guilt." McCoy v. State, supra.

Clearly then, suspicious conduct on the part of the defendant is not, in itself, sufficient corroboration of an accomplice's testimony. Peacock v. State, 369 So.2d 61 (Ala. Cr. App., 1979); also Lindhorst v. State, supra. To the contrary, in order to determine whether the requisite corroboration exists, a court must go through a process of elimination or subtraction --- taking away the evidenceof the accomplice and determining whether the remaining testimony is sufficient to connect the defendant with the commission of the crime. Caldwell v. State, supra; McCoy v. State, 397 So.2d 577 (Ala. Cr. App.), writ denied, 397 So.2d 589 (Ala., 1981); Woods v. State,, 387 So.2d 313 (Ala. Cr. App., 1979); Kimmons v. State, supra; Keller v. State,, 380 So.2d 926 (Ala. Cr. App.), writ denied, 380 So.2d 938 (Ala., 1980); and Leonard v. State, 459 So.2d 970 (Ala. Cr. App., 1984), cert. quashed Nov. 21, 1984.

According to the Caldwell Case:

> "Being in the company of an accomplice in proximity in time to the commission of the crime is not always sufficient corroboration to comply with statutory demands. Rather, when an accomplice and an accused are seen together in somewhat unusual places and tiems in proximity to the locus of the crime, which occurs at an unreasonable hour, the requirements of corroboration are met."

In the present case, we are not dealing with "unusual places", "unusual times", "proximitity to the locus of the crime", or "unreasonable hour". To the contrary, in the present case, the corroborators can place defendant only in very usual p laces at very usual times for defendant and his peer group.

In the case, Booker v. State, 477 So.2d 1388 (Ala. Cr. App,, 1985), the Court of Criminal quoted with approval the following from 23 C.J.S. Criminal Law, Section 812 (b) (1961):

> "The tendency of the corroborative evidence to connect accused with the crime, or with the commission thereof, must be independent, and without the aid, of any testimony of the accomplice; the corroborative evidence may not depend for its weight and probative value on the testimony of the accomplice, and it is insufficient if it tends to connect accused with the offense only when given direction or interpreted by, and read in conjunction with, the testimony of the accomplice."

In the present case, the corroborative evidence does depend entirely upon the testimony of the accomplice for its weight and probative value. Without Strong's testimony, the evidence is scattered, erratic, and at best creates suspicion.

In the case, Thompson v. State, 374 So.2d 388 (Ala., 1979), the Alabama Supreme Court stated that there are two types of corroborative evidence. The first type consists of facts which support the testimony of the accomplice without regard to defendant's alleged participation in the criminal activity. The second type is evidence which tends to connect the defendant with the commission of the offe the Supreme Court ruled that it is the second type of corroboration that is essential to support an accomplice's testimony. In the present case, it is that second type of corroboration that is totally absent.

Furthermore, it has been repeatedly held that corroborative evidence must do more than raise a suspicion of guilt. Thompson v. State, 374 So2d 388 (Ala., 1979); McCoy v. State, 397 So.2d 577 (Ala. Cr. App.) cert. den. 397 So2d 589 (Ala., 1981); Anderson v. State, 44 (Ala. App. 388, 21 So.2d 436, 1968); and Deerman v. State, 486 So.2d 515 (Ala. cr. App., 1986). In the present case, it is doubtful that the corroborating evidence by itself would even raise a serious suspicion.

In the present case, if all of the hearsay and other indirect evidence were to be replaced by the most direct evidence of the same matters, there would still be no proper corroboration of Garrett Marcus Strong's testimony. The Trial Court should have rendered a Judgment acquitting defendant.

ARGUMENT
IX
THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AFTER DISTRICT ATTORNEY STATED IN ARGUMENT THAT HE BELIEVED WHAT WITNESS SAID DURING INVESTIGATIVE INTERVIEW.

In final closing argument, the District Attorney interjected his own testimony into evidence. (RT-353). He indicated that he was present during an interview of co-defendant and witness, Garrett Marcus Strong -- a matter not in evidence, although the witnesses' written statement was: (23-26E). "When that kid laid it on the line on September 23, 1982, without any promising or any help from anybody and told me who pulled that trigger, I believed it."

Immediately, the jury's attention was diverted from the real question: Garrett Marcus Strong's credibility. Instead, their attention was shifted to the credibility of the District Attorney. He might as well have told the jury: "You know me, you trust me, my witness is telling the truth."

The Trial Court recognized the impropriety of the argument and even attempted to give curative instructions. (RT-354-355). The prejudicial nature of the remark was so severe, however, that no curative instruction would be adequate.

In Tarver v. State, 492 So.2d 328 (Ala. Cr. App., 1986), the District Attorney (who prosecuted the case) took the witness stand and gave sworn testimony concerning the voluntariness of defendant's confession. The Alabama Court of Criminal Appeals ruled that such conduct was so clearly erroneous and so severely prejudicial that the conviction would have to be reversed, even though defendant did not object. In that case the prosecutor at least was under oath and subject to cross-examination, unlike the present case. In addition, in the present case, an objection and a motion for mistrial were made.

The type of argument/testimony that we have in the present case has been repeatedly condemned. Waldrop v. State, 424 So.2d 1345 (Ala. Cr. App., 1982); McGhee v. State, 274 (Ala. 373, 149 So. 2d 5, 1963); Brown v. State, 393 So.2d 513 (Ala. Cr. App., 1981); Hall v. U.S., 419 F. 2d 582 (5 Cir., 1969); Adams v. State, 280 (Ala. 678, 198 So.2d 25S, 1967); Knighten v. State; 3 S (Ala. App. 524, 49 So.2d 789, 1951); and Weatherspoon v. State, 34 (Ala. App. 450, 40 So.2d 910, 1949).

The District Attorney's statement of personal belief and testimony concerning witness' interview greatly exceeded the bounds of legitimate argument and denied defendant a fair trial; the error was so prejudicial that it could not be cured by subsequent instructions of the trial court. Jetton v. State, 435 So.2d 167 (Ala. cr. App., 1983); Blue v. State, 246 (Ala. 73, 19 So.2d 11; and Dubose v. State, 148 (Ala. 560, 42 So. 867).

ARGUMENT
X
IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A RANDOM DRAW DOWN OF THE QUALIFIED JURY PANEL IMMEDIATELY PRIOR TO THE MAKING OF PEREMPTORY STRIKES.

Regardless of the black-white ratio on qualified jury panel immediately prior to peremptory strikes, the number of whites needs to exceed the number of blacks only by twelve for the prosecution to be able to exclude every black from jury service. Thus, the larger the panel from which peremptory strikes are made, the better the opportunity is for the prosecution to peremptorily remove all blacks from jury duty. With the racial ratios on the Barbour County jury panel, a random reduction of that panel to 36, the statutory minimum, (Code of Alabama, 1975, Section 12-16-100), would have made it impossible for the State to strike every black. (RT-54). Defendant filed a timely motion for such a reduction, and the motion was denied. (10-C, RT-10). The Trial Court's denial of Appellant's Motion for a random draw down of the panel to a level that would allow at least some blacks to serve on the jury was in violation of the due process and equal protection clauses of Amendment XIV to the United States Constitution and Sections I and VI of the Alabama Constitution.

In view of the positions of some courts which permit any type of rationalization by the District Attorney as compliance with Batson, it is especially important to minimize the ability of attorneys to affect the racial composition of juries.

ARGUMENT

XI

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE BARREL FROM A SAWED-OFF SHOTGUN FOUND AT THE HOME OF APPELLANT'S GRANDMOTHER.

Over the Appellant's objection, the Trial Court allowed into evidence gun parts and testimony concerning gun parts discovered at the home of Appellant's grandmother four weeks after the alleged homicide. (RT-190, 191, 212, 213). Although parts were from a gun of the same gauge as the fatal weapon, they were not shown to have come from the fatal weapon. They were not shown to have ever been in Appellant's possession but were merely found at a house in which Appellant and other people resided. The barrel was never shown to have been connected with the slug removed from the victim. The record does not indicate that the shotgun from which the fatal bullet was fired or any part of it was ever found. The record does not indicate that the gun from which the barrel was sawed was ever found. At the same location where the 20-gauge barrel was found, another barrel of a different gauge was found. (RT-193).

The State's expert witness, Lonnie Ray Harden, was unable to say anything about the barrel other than that it came off of a 20-gauge shotgun. (RT-215-216). He also testified that the slug removed from the body of Marie Driggers Smith was a 20-gauge shotgun slug. (RT-217). Twenty-gauge shotguns and 20-gauge shotgun shells are just much too common to link the barrel to the homicide.

This is a situation similar to that found in the case, Anderson v. State, Ala. Cr. App., 1978, 362 So. 2d 1296. In the Anderson Case, the Trial Court admitted into evidence a .375 magnum pistol which was discovered four months after a murder and four blocks from the murder scene. In that case, the only evidence touching its relevancy or materiality was that such a weapon could have been responsible for some of the injuries to the deceased and testimony that one of the assailants often carried a similar weapon. In the present case, the fact that the barrel was a 20-gauge barrel and that the deceased was shot with a 20-gauge slug shows merely that the barrel could have come off of the weapon causing Mrs. Smith's death. Other testimony showed that the Appellant on occasion carried a sawed-off shotgun. The weapon was found much much further than four blocks from the scene of the homicide (several miles, as a matter of fact). The only significant difference between the Anderson Case and the present case is that the Appellate Court in the Anderson Case considered the admission of the weapon to be harmless. In the present case, considering the overall lack of evidence presented by the State, admission of the gun barrel was quite prejudicial and could not in any sense be considered as harmless.

The holding by the Alabama Court of Criminal Appeals in the Anderson Case is clearly consistent with its holding in the case Washington v. State, 56 Ala. App 555, 323 So. 2d 738 (1975). In Washington Case, the Court held that a weapon

should not be admitted into evidence unless there is evidence tending to show that it was used by defendant at time of the alleged homicide. A mere possibility is clearly inadequate.

Although there might be some tendency to consider the objection to the gun barrel as being a chain of custody matter, the real question is one of relevancy or materiality. The issue is not what might have happened to the barrel after it was discovered at Mrs. Rencie Lynn's carport; but, instead, the issue is whether it has been established that the barrel is in any way connected with the gun which caused Mrs. Smith's death. Clearly it could have been, but so could any other barrel from any other 20-gauge shotgun.

In many cases dealing with admissibility of weapons considered by the Appellate Courts, the decisions were that the weapons were admissible; but, in those cases allowing the evidence, the weapon was specifically connected with the crime. In Cunningham v. State, 22 Ala. App. 583, 118 So. 242, the Court held that a hammer found in defendant's workshop was admissible because it had been specifically identified as the hammer used in an assault. In Russell v. State, 54 Ala. App. 452, 309 So. 2d 489 (1974), the Appellate Court held that the Trial Court properly admitted a butcher knife into evidence based on evidence that the deceased was stabbed with a butcher knife and that a butcher knife was found on defendant's person immediately after the attack. In McGuffin v. State, 178 Ala. 40, 59 So. 635 (1912),

the Alabama Supreme Court ruled that the Trial court properly allowed a pistol in evidence where a witness specifically identified it as being either the actual weapon or identical to a weapon used in a homicide. In Williams v. State, 384 So.2d 1205 (Ala. Cr. App. 1980), a shotgun was admitted into evidence only because ballistics testing positively indicated that it fired the shell found at the scene of the murder.

In ruling that the Trial Court properly admitted into evidence a shotgun barrel found at the home of the Appellant's grandmother, the Court of Criminal Appeals overlooked several important consideration.

First, assuming that the barrel was in fact from the gun that fired the fatal slug, it is clear that it was removed prior to the homicide. (R 151, 160, 242). Therefore, the barrel was not a part of the gun causing Mrs. Smith's death. The barrel itself had nothing to do with the homicide. None of the cases cited by this Court stood for the proposition that a gun part is admissable into evidence if it was removed from the suspected weapon prior to the crime. Taylor v. State, 442 So. 2d 128 (Ala. Crim. App.) cert. denied, 442 So. 2d 128 (Ala. 1983); Humphrey v. State, 370 So. 2d 344 (Ala. Crim. App. 1979); Means v. State, 51 Ala. App. 8, 282 So. 2d 356, cert. denied, 291 Ala. 792, 282 So. 2d 359 (1973); Williams v. State, 384 So. 2d 1205 (Ala. Cr. App. 1980). There was no evidence whatsoever that a sawed-off barrel was in any way connected with Mrs. Smith's death.

Second, if one ignores the fact that the barrel was not used to cause Mrs. Smith's death, the connection between the homicide and the alleged homicide weapon cannot be established with the certainty indicated in the cited cases. In the Williams Case, a ballistics expert determined that the fatal rounds had been fired from the weapon in question; in the present case, such a determination was impossible. (R 145). In Means v. State , supra., this Court affirmed the trial court's admission of a bloody knife found at a murder scene; the present case deals with a barrel found a considerable distance from the homicide scene and having no markings or stains that would have ever placed it at the scene. In Humphrey v. State, supra., the shotgun admitted into evidence was identified by various witnesses as being in the defendant's possession at the time of the crime; in the present case, no witness was able to connect Lynn with the barrel at or near the time of the homicide. In Taylor v. State, supra., the forensic expert was able to identify the make and model of the murder weapon but he was not able to say that a particular weapon of that make and model was the one from which the shot was fired. The opinion does not indicate where and how the gun was recovered. In the present case, the expert could only say that the slug was twenty-gauge; he could not give the make or the model. In addition, the barrel was discovered much later and at a considerable distance from the homicide scene. The connecting factors found in the Taylor Case are just no present.

In Frederick Lynn's case, the failure of the Trial Court to sustain Appellant's objection to the admissibility of the barrel and the failure of the Trial Court to grant defendant's motion to exclude that testimony were error and were clearly prejudicial to the defendant in that there was absolutely no other physical evidence tending in any way to link Appellant, Frederick Lynn, to the killing of Marie Driggers Smith. This error on the part of the Trial Court alone is sufficient grounds for reversing the conviction of Frederick Lynn.

ARGUMENT
XII
THE ALABAMA DEATH PENALTY STATUTE
IS UNCONSTITUTIONAL IN THAT IT CONSTITUTES
CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION
OF THE CONSTITUTIONS OF THE UNITED STATES AND OF ALABAMA

The question of the constitutionality of the Alabama Death Penalty Statute has not been developed herein. Appellant is aware that this Court has been presented with every conceivable argument that the Alabama Death Penalty Statute is unconstitutional in that it constitutes cruel and unusual punishment, forbidden by both the United States and Alabama Constitutuions. For the purpose of preserving the issue for any further appeals which might be taken in State or Federal Court, the Appellant does hereby contend that the Alabama Death Penalty Statute is unconstitutional per se and that it is unconstitutuional as it is specifically applied to the present case. However, Appellant cannot provide any further enlightenment on these issues and begs the Court to consider these propositions as they have been presented in other death-penalty cases.

ARGUMENT
XIII
THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION
THAT THE APPELLANT RECEIVE TWO STRIKES FOR EACH ONE
STRIKE FOR THE STATE IN JURY SELECTION.

The alleged homicide in the present case took place in 1981; and, at that time, the law allowed the defense two strikes for each one strike of the prosecution. (Code of Alabama, 1975, Section 12-16-122). In 1982, the Statute was amended to allow the defendant only one strike for each strike by the prosecution. (Code of Alabama, 1975, Section 12-16-100, Act No. 82-221).

The Legislature in passing a law in 1982 affecting crimes committed in 1981 enacted a "ex post facto" law in violation of Section IX of the United States Constitution and Section VII and XXII of the Alabama Constitution. Furthermore, under the due process clauses of Amendment XIV to the United States Constitution and Section VI of the Alabama Constitution, a person may not be convicted of a crime unless the evidence establishes his guilt beyond a reasonable doubt. Because it is human nature to assume that one who has been officially accused of a crime is guilty as charged, the two-for-one strike is essential to an effective presumption of innocence and to an effective standard that a defendant must be proven guilty beyond a reasonable doubt in order to be convicted.

Furthermore, the legislative act which abolished the two-for-one strike provision was not cleared by the U.S. Department of Justice as required by the Voting Rights Act of 1965, U.S.

Code, Title 42. Any statute potentially affecting the political power of Negroes must be pre-screened by the U.S. Justice Department. It goes without saying that a member of a minority race attempting to get members of his own race on a jury would better able to do so with the old two-for-one strike system.

ARGUMENT
XIV
WHEN COMPARED WITH SIMILAR CASES, THE DEATH PENALTY IS INAPPROPRIATE IN THIS CASE.

Research discloses no death penalty case in the past decade which is in any way comparable to the present case.

In Evans v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), affirmed in part and reversed in part, 361 So. 2d 666 (Ala. 1978), cert. denied, 99 S. Ct. 1267, 440 U.S. 9301, small children were present when the murder was committed; Evans was under sentence of imprisonment at the time of the murder; and Evans had been involved in over 250 robberies and kidnappings. In Ritter v. State, 375 So. 2d 266, (Ala. Crim. App. 1978), affirmed, Ex parte Ritter, 375 So. 2d 270 (Ala. 1979), again small children were present during the murder; and again there was a long record of crimes of violence. In Bush v. State, 431 So. 2d 555, (Ala. Crim. App. 1982), affirmed, 431, So. 2d 563, (Ala. 1983), the defendant was on a crime spree during which he robbed at least two convenience stores and shot three people, two of whom died from their wounds. In addition, the defendant had a prior record of a crime of violence. Also, the crime was committed for the purpose of eliminating an eye witness to a murder.

In the prior appeal of this case (4 Div. 183, Lynn v. State, 477 So. 2d 1365, (Ala. Cr. App. 1986), the Court of Criminal Appeals compared the present case with Clisby v.

State, 456 So. 2d 86 (Ala. Cr. App. 1982), aff'd in part, rev'd in part, 456 So. 2d 95 (Ala.), on remand, 456 So. 2d 98 (Ala. Cr. App.), on remand 456 So. 2d 99 (Ala. Cr. App.), aff'd, 456 So. 2d 102 (Ala. Cr. App. 1983) aff'd 456 So. 2d 105 (Ala. 1984). That comparison, it is submitted, is likewise inappropriate. Clisby beat a fifty-eight year old crippled man to death with an axe. The victim in the present case had a quick death from a single gunshot wound. Clisby had a prior conviction for murder. Lynn has no significant prior history of criminal activity. Clisby was an adult at the time of his crime, while Lynn was a juvenile.

The Court of Criminal Appeals also compared the present case with the case Lindsey v. State, 456 So. 2d 383 (Ala. Cr. App. 1983), aff'd, 456 So. 2d 393 (Ala. 1984). Lindsey has a significant history of prior criminal activity, while Lynn has no such history. Lindsey was an adult at the time of the crime, while Lynn was a child. Lindsey both shot and stabbed his victim, each sufficient to cause death, while the victim in the present case died of a single gunshot wound.

Below is a brief synopsis of other recent cases showing imposition of death sentences for crimes far more heinous that the crime with which Lynn was charged.

Ex parte Floyd, 486 So. 2d 1321 (Ala. 1986): Victim was dragged from car, robbed, beat, kicked, stomped, tied to a tree, and run over by a car. The defendant had two prior convictions for robbery. He was an adult at the time of the homicide.

Ex parte Bell, 475 So. 2d 609 (Ala. 1985): Victim was tied up and stuffed into the trunk of a car. Victim was hauled into the woods, then was pushed into a trench, and was shot twice in the head.

Ex parte Jefferson, 473 So. 2d 1110 (Ala. 1985): Victim sustained deep multiple lacerations. Death was slow. Circumstances showed defendant to be an unusually depraved man.

Ex parte Kennedy, 472 So. 2d 1106 (Ala. 1985): Victim was killed slowly by suffocation with a pillow. Victim was raped repeatedly, beaten and cut. This was one of the most heinous crimes in our state's history.

Ex parte Harrell, 470 So. 2d 1309 (Ala. 1985): The victim was a police officer in the line of duty. The defendant had a bad criminal record. The defendant was unrepentant and was seen clapping and smiling immediately after the homicide.

Ex parte Thomas, 460 So. 2d 216 (Ala. 1984): The victim had been shot 6 times while she was nude. There were numerous injuries to her body while she was still alive. She had been tortured, raped, sexually abused, and mutilated. The defendant had a long record of criminal history. This also was one of the most vile crimes in the state's history.

Ex parte Grayson, 479 So. 2d 76 (Ala. 1984): Defendant burglarized, beat, terrorized, raped, and suffocated to death a helpless 60-year old lady.

Ex parte Watkins, 509 So. 2d 1065 (Ala. 1984): Defendant had prior record of crime of violence. In the capital felony, he terrorized a store full of people before killing a store employee.

Ex parte Duren, 507 So. 2d 121 (Ala. 1987): There were two victims, one who survived and one who did not. Both victims were tied up and hauled around in the trunk of a car before being shot repeatedly.

Ex parte Thompson, 503 So. 2d 887 (Ala. 1987): Defendant robbed and kidnapped victim, hauled her around in her automobile, put her in a well, and shot ehr repeatedly.

Ex parte Tarver, 500 So. 2d 1256 (Ala. 1986): Defendant was on parole and had been previously convicted of crimes. The victim was shot three times.

Ex parte Hubbard, 500 So. 2d 1231 (Ala. 1986): The defendant had a prior murder conviction. The defendant shot victim three times with a significant amount of time between each shot; and the victim obviously suffered much pain and agony.

Ex parte Jones, 456 So, 2d 380 (Ala. 1984): The victim was shot three times. He had also been struck by a blunt object. Defendant was on parole at time of homicide and had a bad prior record for crimes of violence.

Clearly, none of these cases are similar to the present case. 1. Lynn is accused on only one homicide. 2. No children were present. 3. Lynn had no record of crimes of violence. 4. Lynn was not under sentence of imprisonment. 5. There is no evidence that Lynn was attempting to eliminate an eyewitness to a crime. 6. The victim was not tortured, raped, or mutilated.

Considering the above factors together with the fact that Lynn was only 16 at the time of the alleged homicide, certainly this is not a case in which the death penalty is the appropriate punishment.

In addition to comparing Lynn's case with "similar cases", look at the different sentences for two possible accomplices in the same case. Because of a plea-bargaining deal, the only man who is known to have been at the scene of the crime received a thirty-year sentence---and, based solely upon his word, another person might suffer the death penalty. (Garrett Marcus Strong was caught by his fingerprints and also confessed). Is it right to allow a confessed killer to live and, based solely on his word, put another person to death?

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 1987, served copies of the foregoing Brief by placing copies of said Brief in the United States Mail, postage prepaid, and addressed to the following:

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